

Still Waiting for Restitution

A court ruling provides an opportunity to once again take a close look at the content and interpretation of the Property Act¹

By Fritz Enderlein

Jüdische Zeitung No. 10, October 2012, page 12.

The OLG Frankfurt (Higher Regional Court) recently addressed several issues, including the following:²

1. Are §§ 2 (1) sentence 3³ and 30a⁴ of the Property Act unconstitutional?
2. Was Article 14 of Basic Constitutional Law violated?

The German state is not entitled to Jewish property.

The courts expressed the opinion that assigning the Jewish Claims Conference legal ownership (according to § 2 of the Property Act), instead of the entitled party who did not take action on time, keeps the German state from exercising usufructuary rights to the assets of Jewish victims who were persecuted or murdered. Usufructuary rights to Jewish assets exercised by the German state (or the Aryanizers) would also be excluded when the JCC is simply named as a trustee. However, one situation clearly does not exclude the other.

Unfortunately, the Property Act does not exclude usufructuary rights to Jewish property exercised by the German state (or the Aryanizers). This is because the JCC was not generally named as the successor to assets for which there are no heirs. This requires a claim to be

¹ This is an abridged version of an article published in the *Zeitschrift für offene Vermögensfragen (ZOV)*, issue 4/2012, page 181

² The other issues included the following:

1. Refutation due to fraudulent misinterpretation (§ 123 BGB)
2. Was the action taken by the JCC immoral (§ 138 BGB)?
3. Does the JCC have an obligation to provide information and advice?
4. Is the JCC required to seek out heirs?
5. Was the action taken by the JCC illegal (§ 823 BGB)?
6. Did the JCC unjustly receive financial benefits (§ 812 BGB)?

³ I argue this point in my article "§ 2 para 1 sentence 3 of the Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund of the Jewish Claims Conference" published in the *Zeitschrift für offene Vermögensfragen (ZOV)*, issue 6/2008.

⁴ See article "The Supreme Constitutional Court and § 30a Property Act" in the *Zeitschrift für offene Vermögensfragen (ZOV)*, issue 5/2010

submitted within the time limits specified in § 30 of the Property Act.⁵ Global applications by the JCC have, for the most part, have been rejected.⁶

According to the court opinion, although the assignment of rights to the JCC does not directly benefit the heirs, it can at least help other needy Jewish citizens who receive support from the defendant's organization, which provides partial funding for various social programs.

The social programs sponsored by the JCC, which are clearly in line with the organization's founding principles, are financed with funds that are withheld from the legitimate owners.

The advantage for the Federal Republic of Germany lies in the fact that the more money the JCC contributes at the expense of those descendants of murdered Jews who were cheated out of their inheritance, the less the German government has to contribute to relief funds, such as the one promised to the JCC in the agreement between the GDR and the FRG for the implementation and interpretation of the Article 2 of the Unification Treaty.⁷

The JCC however, does not only support social programs. For years, criticism of the JCC distribution practices has been voiced by major Jewish groups, especially from Israel.⁸ I therefore share the opinion expressed by Johannes Wasmuth that Germany is responsible for the use of the money paid to the JCC.⁹

The position of the JCC as trustee

§ 2 para 1 sentence 3 Property Act is not unconstitutional per se. But its application up until now is unconstitutional in combination with § 30a of the Property Act. The interpretation of the Property Act in a way that ultimately includes the expropriation of those affected is equivalent to accusing the German state of intending this expropriation or at least regarding it as acceptable.

Such a legal consequence, which completely obliterates the legal positions of the entitled claimants, cannot be intentional. "The real heirs would be immediately deprived of all rights without their knowledge. [...] This interpretation would defeat the purpose of the law."¹⁰

⁵ This has been criticized by me in detail, *ibid*

⁶ See also Johannes Wasmuth, "Global applications submitted by the Jewish Claims Conference and the time limits specified by the Property Act" in *ZOV* 4/2003, p. 225 ff

⁷ For an overview of all funds, see Fritz Enderlein, "The Jewish Claims Conference in Court?" *ZOV* 5-2011

⁸ Examples are cited in the article "Restitution bypasses victims: Why the German government needs to take immediate action!" in *ZOV* 4-2010, Wasmuth also criticized these practices, *prev. cited*, p. 229

⁹ Fritz Enderlein, "Is the Federal Republic of Germany responsible for the use of the money paid as restitution to the JCC?" *Berliner Anwaltsblatt* 10/2009, p. 354; Wasmuth, *ibid*

¹⁰ Stegemann, "The 'Conference on Jewish Material Claims Against Germany' as a statutory trustee for the heirs of property owners expropriated by the Nazis." <http://www.opiniojuris.de>

I have written several articles recommending that § 2 para 1 sentence 3 of the Property Act be supplemented as follows: "If, however, a Jewish claimant or their successor appeals to the JCC after the application deadline specified in the Property Act, the JCC should only be considered as a trustee on behalf of these beneficiaries and be required to appropriately share the proceeds or compensation with them."¹¹

Stegemann indicates that such a supplement of the Property Act is not necessary, since the logistical application of the existing rules would lead to the same result. Accordingly, § 2 para 1 sentence 3 already specifies who the real beneficiary should be. The wording of the legislation may lead to the conclusion that the legislators assume a priority among the beneficiaries. The provisions specify that the JCC can only be regarded as the entitled party if the victims of persecution, or their heirs (primary beneficiaries), have failed to file a claim. The application of § 2 para 1 sentence 3 should not lead to a reversal of the relationships between the claimants. The principal obligation of the Federal Republic of Germany to ensure restitution and compensation is primarily aimed at those who have lost their property as a result of Nazi persecution. The JCC is not the victim of persecution. The real victims are those individuals who have suffered, as well as their descendants who are still suffering today.¹²

The wording of § 2 para 1, sentence 3 of the Property Act is "...merely a legal fiction pertaining to succession in favor of the JCC. The JCC is regarded as the legal successor only 'in conjunction with claims filed under the Property Act,' i.e., only in connection with the provisions of the Property Act. Conversely, this means that the legal fiction is actually limited to the application of § 2 section 1 sentence 3 of the Property Act and that, outside of this application, the JCC is neither the actual successor, nor can it be regarded as such." "The legal status of the actual heirs is thus not affected by § 2 para 1, sentence 3 of the Property Act and, from a legal standpoint, these people remain the rightful legal successors to the expropriated victims."¹³

In addition, "In application of § 2 para 1, sentence 3 of the Property Act, it (must) be maintained that the heirs, according to German law, are the legal successors as defined by § 1922 BGB (German Civil Code). With the assets, or compensation, the JCC receives something that it would not have been entitled to, due to a non-existent right to succession

¹¹ See footnote 9, also in ZOV 5-2009

¹² See "Missed application deadlines – correspondence" ZOV 4-2010, letter from July 20, 2010; also Wasmuth, p. 229: "The JCC was never subjected to persecution".

¹³ Stegemann, previously cited

(this is only a legal fiction)." Therefore, pursuant to § 2018 of the Civil Code, the rightful heirs could reclaim what was assigned to the JCC.¹⁴

If there were no legal fiction regarding legal succession, the unclaimed assets would (initially) go to the German fiscal authorities. Once the heirs become aware of this, they would have a right to claim the assets. This would place the entitled heirs in a better position – if it were not for § 2 section 1 sentence 3 of the Property Act! This obviously does not apply to any property for which there are no heirs.

The German Federal Court of Justice (BGH) pointed out in an earlier decision that the Jewish Restitution Successor Organization (JRSO), a predecessor of the JCC, only serves in the role of a trustee. "The displacement of the real heirs by the Jewish Restitution Successor Organization would basically mean that the burden from the Nazi injustice would be fully borne by the persecuted victims. The underlying concept of justice that is used for reparation and restitution laws is, in principle, only fulfilled if compensation were to be awarded to the person who actually suffered the damage."¹⁵

Originally, there was no intention to reallocate Jewish property assets. The plan was to assign uninherited Jewish property to the JCC. The committees involved unanimously agreed that the JCC should only be assigned to the position of trustee for assets or properties for which there were still heirs. According to an article appearing in the Israeli newspaper Maariv on September 22, 1995, there was no indication that the German government planned to disinherit the lawful heirs from their rights to reclaim illegally confiscated property assets. Quite to the contrary. The German government declared that it would be in agreement if the property was returned to the rightful heirs by the Claims Conference. "We (the German government) have no objection whatsoever if the Claims Conference returns property assets to heirs who failed to submit an application before the deadline. This is one of the reasons why the Jewish Claims Conference was named as the legal entity entitled to receive the property assets in question..."¹⁶

Based on the Property Act system, Johannes Wasmuth¹⁷ is of the opinion that the JCC should clearly be regarded as a trustee, even though the duties associated with the trustee position are not explicitly defined. "Legislators apparently assumed that JCC compliance with this function is to be expected." But due to the actions taken by the JCC, Wasmuth calls on legislators to define the position of the JCC in detail. Until this happens, courts are likely to

¹⁴ Previously cited

¹⁵ BGH verdict from February 28, 1955, GSZ 4/54, quoted by Stegemann

¹⁶ Cited from a memorandum written by David Rowland for the JCC on May 13, 1999

¹⁷ Previously cited, p. 228

continue interpreting the Property Act in a way that is contradictory to the concept of restitution.

The time limits specified by § 30a of the Property Act

On July 30, 1998, the Federal Administrative Court (BVerwG) declared the time limits specified under § 30a paragraph 1 sentence 1 of the Property Act to be consistent with article 14, paragraph 1, sentence 1 Basic Constitutional Law. The opinion was expressed that the Property Act serves to redress the injustice suffered. Instead of being based on single fundamental rights, the claims stipulated in the Property Act stem from the concept of a constitutional and social state. This was also confirmed by the Federal Constitutional Court (BVerfGE 84, 90).

When the Federal Republic of Germany acknowledged the guilt of the German people as a whole vis-à-vis Jews and signed the Luxembourg Agreement with the State of Israel and the JCC in 1952, there was no talk of a constitutional and social state concept. Instead the focus was on the responsibility of the German state for reparations.

The constitutional and social state concept of the Property Act is a specific consideration within the context of German reunification. The following statement is from the joint declaration on unresolved property issues between the governments of the GDR and FRG from June 15, 1990: "In resolving the property issues, both governments agree that a socially acceptable balance between various interests must be established [...] This is the only way to ensure peace under the law for the future of Germany." At that time, no one thought of including the persecution that took place from 1933 to 1945 in the future Property Act. Despite the principle "return of property takes precedence over compensation," the idea at the time the GDR acceded to the FRG was to strike a socially fair balance between East and West Germans, and not to reverse all changes in ownership.

Establishing a "socially acceptable balance between various interests" should not play a role in conjunction with § 1 para 6 of the Property Act.¹⁸ When it comes to the victims of the Holocaust, the goal is not to maintain a social balance, but to offer comprehensive reparations, not only to the Jewish people as a whole, but to individually compensate the survivors or their heirs.

The judgment states further that in a decision from April 29, 2004 (7 B 85/03), the Federal Administrative Court once again rejected concerns about the constitutionality of § 2 para 1,

¹⁸ This is why there is something to be said in favor of separate legislation, Wasmuth, *prev. cited*, Fritz Enderlein, see footnote 6

sentence 3 of the Property Act and stated that the fiction of legal succession based on § 2 Abs. 1 S. 3 of the Property Act is solely dependent on the question of whether the former Jewish owners or their heirs have filed a claim. Otherwise, their claim is nullified with the expiry of the time limit(s) specified in § 30a para 1 sentence 1 of the Property Act and only the fictive successor is entitled – providing this party has filed a claim before the deadline. In this respect, **it doesn't matter why a claim was not filed** (BVerwG 7 C 64.02, p. 14; emphasis added by FE). And if the JCC does not file a claim on time, or its global applications are not accepted, the beneficiary remains the German state.¹⁹

According to Johannes Wasmuth, "Due to Germany's historical responsibility, the provisions in § 30a para 1 sentence 1 of the Property Act represent a serious, unjustifiable mistake on the part of the legislature"²⁰ In this context, Wasmuth pointed out that the time limits were introduced in 1992 based on an initiative and pressure from the JCC.

In the eyes of the Federal Constitutional Court and the Court of Appeals (OLG), the reasons for failure to file a claim are irrelevant. At the same time, some form of misconduct on the part of the state was the cause in many cases.²¹

The naming of the JCC as legal successor to the assets of Holocaust victims usually involves uninherited and unclaimed assets. The JCC bylaws supplemented in 1994 also refer to the JCC as "a successor organization for uninherited and unclaimed Jewish property." These bylaws make no reference to the German Property Act. Nowhere does it say "unclaimed within the time limit specified by the Property Act." From the moment an heir petitions the JCC, the property is no longer unclaimed.

Uninherited and unclaimed were originally regarded as equal terms. In other words, since there were no heirs, there could be no claim filed by an individual. But the assets should under no circumstance go to the German government²² or remain in the possession of the "aryanizers." The idea was to compensate the individual survivors or their heirs. There was

¹⁹ See details on global applications in "Restitution bypasses victims: Why the German government needs to take immediate action!" previously cited

²⁰ *ibid*

²¹ I have described the many different reasons in ZOV 6-2008, see footnote 2. For details on government misconduct, see page 4 of the "Jüdische Zeitung" published in September 2012

²² The following was included in the information used to prepare for the Luxembourg Conference: "The mass extermination by the Third Reich has resulted in a vast amount of claims for which there are no living owners or heirs. The millions who have perished are at stake here. Though they are absent, their assets must not be abandoned. Germany should not retain any benefit from the thoroughness of the Nazi extermination program." These assets were earmarked for "Jewish organizations that support surviving victims of Nazi terror." Document CC 8079 from March 21, 1952; courtesy of the Central Archives for the History of the Jewish People (CAHJP) in Jerusalem.

certainly no intention to expropriate them, which is what happened as a result of an incorrect interpretation of the Property Act.

In accordance with its statutes, the JCC was to act on behalf of the Jewish heirs, i.e. as a trustee. At least that was the understanding at the time – especially among Jewish survivors and their descendants.

The court deals with the claimants' arguments that the time limits specified in § 30a of the Property Act negatively affect their inheritance rights and, for constitutional reasons, should be omitted because their intended purpose, i.e. to speed up the process, is not borne out by the result. In the eyes of the court, this argument is not constitutionally relevant.

In my opinion, it is very important to know whether or not a legal standard serves its intended purpose. In the case of § 30a of the Property Act, the issue is very clear. All arguments that attempt to justify this standard are either invalid or do not stand up to critical analysis.²³ The considerations regarding financial planning, aimed at justifying the deadlines, were completely illusory. In this context, I find the argument about reducing the workload of government authorities to be especially bizarre. I have already noted that, when it comes to the heavy workload, it is surely reasonable to ask whether this justifies expropriation of Jewish heirs. If, as Chancellor Merkel has pointed out, it is in the best interests of Germany to stand up for the right of existence and the security of Israel, would it not be equally important to ensure that compensation for Nazi injustice goes to the people who suffered this terrible fate and whose property was stolen? Doesn't this include the people who failed to meet the deadlines?²⁴

A violation of Basic Constitutional Law?

Article 14 paragraph 1 of Germany's Basic Constitutional Law states: "Property and inheritance shall be guaranteed. Content and limits are determined by law." Citing Germany's Federal Administrative Court and Constitutional Court, the Frankfurt Court of Appeals – unlike the claimants – does not see a violation of this fundamental right and asserts that § 30a of the Property Act adequately defines the limits of property.

My proposal to supplement the Property Act to preclude expropriation was rejected by all relevant offices – with different reasoning. I received a statement from the Bundestag Judiciary Committee that refers to Article 14 of Basic Constitutional Law: "Aside from the constitutional and legal considerations and the grounds outlined by Mr. Kauder in his letter from January 20, 2010, a legislative revision of the Claims Conference legal position would

²³ See footnote 5

²⁴ *ibid*

contradict the principle of legal certainty and the fundamental right to property under Article 14 of Basic Constitutional Law."²⁵

While the courts join the Ministries of Justice and Finance in their opinion that the expropriation of Jewish heirs is not in violation of Article 14 of Basic Constitutional Law, protection under Article 14 is afforded to the JCC. The fact that the JCC is protected by the Constitution is, however, denied by the Federal Constitutional Court.²⁶

Beyond a violation of Article 14, Basic Constitutional Law, the strict application of the Property Act in combining § 2 para 1 sentence 3 with §30a would infringe on the principle of equality under Article 3 paragraph 1 of Basic Constitutional Law, which states: "All persons are equal in the eyes of the law." This clearly refers to all laws and not to any single law.

While individual victims were required to file their claims by December 31, 1992 or June 30, 1993, the JCC was granted the right to submit claims in accordance with the Nazi Persecution Compensation Act up until June 30, 2007 (§ 1 para 1a). Other victims were given the option to submit applications until December 31, 2019: § 9 para 3 VwRehaG (administrative rehabilitation law), § 7 para 1 StrRehaG (criminal rehabilitation law), § 20 BerRehaG (occupational rehabilitation law).

Many clients turned to the German Bundestag Petitions Committee in 2010 and 2011. The petition requested an amendment to the Property Act to the effect that the JCC would only be named as a trustee for the legitimately entitled persons and would be required to give them a fair share of the proceeds if they contact the JCC after the application deadline specified in the Property Act. The Petitions Committee took a long time to return a recommendation for resolution.²⁷ The recommendation relied on a statement by the Federal Ministry of Justice and repeats all the old arguments: that the application deadline specified in § 30a of the Property Act is a substantive time limit, that § 2 para 1 sentence 3 of the Property Act is required to prevent the assets of Nazi victims from falling into the hands of those who benefited from the persecution or subject to the German fiscal authorities. As explained above, this objective would not be hindered in any way if the JCC was assigned as only a trustee of the returned assets. Therefore, these arguments lack any trace of logic.

The Petitions Committee however, is concerned about the freedom of disposition of the JCC. "The trustee model requested by the petitioners would mean that the JCC would have to administrate the proceeds in the interest of the Jewish victims."²⁸ This is exactly what the

²⁵ See footnote 10, letter from March 16, 2010

²⁶ The Jewish Claims Conference and the Constitution, ZOV 1-2011

²⁷ Bundestag bulletin 17/8911

²⁸ *ibid*

heirs expect from the JCC and support for this has been refused. Despite the countless stories about the fate of Nazi victims from Israel, the USA, Argentina, Chile, Great Britain, Austria and Australia, the Petitions Committee saw no reason to take action. The Bundestag followed the recommendation from the Petitions Committee and decided to close the petition process on March 22, 2012.

International law

The right to property is not only established in Germany's Basic Constitutional Law. It is regarded as a form of natural justice and is included in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Protocol No. 1. According to Article 1, " Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

One most certainly could not claim that any public interests are served by the expropriation of Jewish victims of Nazi terror. But under the general principles of international law, even an expropriation would require reasonable compensation.

By refusing to grant restitution to individual victims, the Federal Republic of Germany is failing to fulfill its international obligations specified in Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This was verified by a judgment of the European Court of Human Rights (ECHR) on December 8, 2011.²⁹ This verdict states that the scope of this article includes inheritance rights based on § 1 para 6 of the Property Act, regardless of whether and when a claim was filed. The ECHR referred to protected "legitimate expectations."³⁰

In closing, I would like to reference the international conference on "Holocaust Era Assets" held in Prague on June 26-30, 2009³¹ and attended by 46 states, including the Federal Republic of Germany. The Terezín Declaration adopted by the conference on June 30, 2009 includes the following: "Noting that the protection of property rights is an essential component of a democratic society and the rule of law, [...] we consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust

²⁹ German translation in ZOV 1-2012, p. 32

³⁰ See article by Stefan von Raumer, "The Federal Republic of Germany's elimination of inheritance-related demands through 'failure to file' preferential restitution claims in accordance with § 30a para 1 sentence 4, 2. Alt. of the Property Act is contrary to the convention agreement, ZOV 1-2012, p. 2

³¹ www.holocausteraassets.eu

(Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner.”

The administration of justice should ensure that the Federal Republic of Germany meets its international obligations.